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No. 78-823

In the Supreme Court of the United States

OCTOBER TERM, 1978

BEN R. DRAKE AND JENNY DRAKE, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
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The principal question presented by the petition in this internal revenue summons enforcement case is whether the court of appeals correctly dismissed petitioners' appeal as moot.

The pertinent facts are as follows: On October 6, 1977, Special Agent Curtis G. Guiles of the Internal Revenue Service issued a summons to O'Brien, Simmons & Company, an accounting firm in Boise, Idaho, to produce records and give testimony pertaining to petitioners' tax liabilities for the period 1974-1976. The agent thereafter issued additional summonses on October 25 and 28, 1977. The October 25th summons requested retained or work copies of petitioners' individual, partnership, and/or corporate income tax returns and employment tax returns for the three years (R. 9-10).[1] The October 28th summons

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[1] "R." refers to the reproduced record filed with the court of appeals. "Tr." refers to the transcript of the district court proceedings.

requested work papers and summary sheets used in the preparation of petitioners' individual, partnership, and/or corporate income tax returns, and employment tax returns, as well as personal and business records, including check registers, cancelled checks, and income and expense journals and ledgers (R. 11-12). At petitioners' request, the accounting firm refused to comply (R. 2-3, 7-8, 20; Tr. 6).

Following the accounting firm's refusal to comply, the United States and Special Agent Guiles sought enforcement of the October 25th and 28th summonses in the United States District Court for the District of Idaho. In an affidavit filed with the district court, Guiles stated that he had issued the summonses as part of an investigation to determine petitioners' correct tax liability for 1976 (R. 6-7). Petitioners intervened in the enforcement proceedings asserting, *inter alia*, that the October 6th summons had been improperly used to "freeze" petitioners' records and papers in the accounting firm's possession, and that the summonses were issued in furtherance of a criminal prosecution. In a supporting affidavit, petitioner Ben R. Drake stated that, because of the October 6th summons, the accounting firm had denied his requests for the return of the summoned records and papers. He stated that Agent Guiles advised him on October 6, 1977, of his "Miranda" rights,[2] and, on January 30, 1978, that an investigation of willful failure to file a tax return was being conducted (R. 21). At the hearing before the district court, the agent was called as a witness by petitioners' counsel (Tr. 4). He testified that the specific purpose of his investigation was to determine whether petitioners should have filed a 1976 tax return, and that the matter of a criminal prosecution had been discussed with his

[2]Petitioner was probably referring to the statement that special agents routinely give taxpayers describing their rights at initial meetings. See *Beckwith* v. *United States*, 425 U.S. 341, 343 (1976).

supervisor, but that no steps had been taken to initiate one (R. 1, 6, 8, 18-22; Tr. 9-13).

At the conclusion of the hearing, the district court ordered the summonses enforced. Petitioners filed a notice of appeal, and a motion to stay execution of the enforcement order. The district court denied petitioners' motion on the grounds that it was unlikely that they would prevail on appeal and the public interest in expeditious summons enforcement. The accounting firm thereafter complied with the summonses. On the government's motion, the court of appeals dismissed petitioners' appeal as moot (R. 24-29; Pet. App. 14-15).

1. As petitioners correctly point out (Pet. 6-7), a case is moot only when there is nothing further for the court to act upon, when the controversy has ceased to exist, and when it is impossible for the court to grant effective relief. See, *e.g.*, *St. Pierre* v. *United States*, 319 U.S. 41 (1943); *Atherton Mills* v. *Johnston*, 259 U.S. 13, 15 (1922); see also 13 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3533 at 264, 266 (1975). Here, once the accounting firm had complied with the summonses, the controversy between the parties was at an end and the question whether the Internal Revenue Service should have been allowed to examine the books and records became academic.

Uyeda v. *Brooks*, 348 F. 2d 633 (6th Cir. 1965), and *Sibron* v. *New York*, 392 U.S. 40 (1968), upon which petitioners rely (Pet. 6, 8), are distinguishable. In *Uyeda*, the NLRB election that the district court had ordered decertified would have been recertified upon a reversal by the appellate court. In *Sibron*, even though the defendant had served his sentence, the court's reversal of his conviction relieved him of the collateral consequences of that conviction (see 392 U.S. at 55-58). Here, however, the court of appeals could not grant petitioner effective relief because the summonses had been obeyed; the case is

therefore moot. In so holding, the decision below is in accord with the rulings of four other circuits that compliance moots a summons enforcement case. *E.g., Barney* v. *United States*, 568 F. 2d 116 (8th Cir. 1978); *United States* v. *Hankins*, 565 F. 2d 1344 (5th Cir. 1978); *Kurshan* v. *Riley*, 484 F. 2d 952, 953 (4th Cir. 1973); *United States* v. *Lyons*, 442 F. 2d 1144 (1st Cir. 1971). The only possible exception is the decision of the Third Circuit in *United States* v. *Friedman*, 532 F. 2d 928 (1976). There, the court concluded that a summons enforcement proceeding did not become moot even after compliance because a ruling that the summonses were unenforceable on the ground that they were issued solely for a criminal prosecution could affect the possible use of the summoned material in any subsequent criminal or civil proceeding. While we believe that such contentions are more properly presented in whatever criminal or civil case may subsequently ensue rather than in the summons enforcement proceeding, the fact that there was incomplete compliance with the summons in *Friedman* serves to distinguish that case (*id.* at 931).[3]

2. Petitioners' principal argument on the merits (Pet. 10-11) that the summonses should not have been enforced is that they were allegedly issued in furtherance of a criminal prosecution. But the record establishes that neither the special agent nor the Internal Revenue Service had abandoned possible civil objectives for inquiring into petitioners' tax matters and that no recommendation for

[3]*Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498 (1911), upon which petitioners rely (Pet. 8), is similarly distinguishable. There, the possibility existed that disputes would recur without resolution through appellate review despite any validity that the terminal company's position might have had (219 U.S. at 515-516); see also *St. Pierre* v. *United States*, *supra*, 319 U.S. at 43. However, this case involves no issue that is capable of repetition yet evading review. The mootness of the present case is attributable to the non-existence of a live controversy since the event petitioners sought to prevent, enforcement of the summonses, has occurred.

criminal prosecution had been made. In such circumstances, the fact that the special agent may also have been examining the criminal implications of the case does not render the summonses unenforceable. *United States* v. *LaSalle National Bank*, No. 77-365 (June 19, 1978); *Donaldson* v. *United States*, 400 U.S. 517, 532-536 (1971).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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